Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004	)	MB Docket No. 05-49
	)	
	)	
Implementation of Section 340 of the Communications Act	)	

JOINT COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND OF THE ABC, CBS, FBC, AND NBC TELEVISION AFFILIATE ASSOCIATIONS

Marsha MacBride
Benjamin F.P. Ivins
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

Jonathan D. Blake
Kurt A. Wimmer
Jennifer A. Johnson
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Counsel for the CBS Television Network Affiliates Association and for the NBC Television Affiliates Association

Wade H. Hargrove
Mark J. Prak
David Kushner
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P.
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street Mall
Raleigh, North Carolina 27601

Counsel for the ABC Television Affiliates Association and for the FBC Television Affiliates Association

April 8, 2005

Table of Contents

Summary

The Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") provides satellite carriers, *inter alia,* an expanded compulsory copyright license to allow satellite delivery of a television broadcast station's signal outside the station's DMA to satellite subscribers located in communities where the station is "significantly viewed." NAB and Network Affiliates agree with many of the tentative conclusions set forth in the *Notice* to implement SHVERA's significantly viewed provisions, including:

- Section 76.54 should be revised to extend it to satellite carriers, to update the existing reference to "Grade B contour," to eliminate an outdated reference, and to correct a typographical error.
- The "noise limited service contour" should be specified for a digital television signal.
- A DTV-only station seeking significantly viewed status should petition pursuant to the requirements in Section 76.54.
- The process for seeking significantly viewed status for satellite delivery of out-of-market signals should be the same as it is for cable, and the process established in existing Sections 76.5 and 76.7 should apply.
- Broadcast stations or program suppliers should be able to petition the Commission for waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules for satellite carriers as proposed.
- The definition of "satellite carrier" should include entities that own and operate their own satellite facilities, entities that lease capacity from another entity that is licensed to provide service, and entities using a non-U.S. licensed satellite to provide service pursuant to a blanket earth station license.
- Where a local network station is not broadcasting in a digital format, for reasons which the Commission has recognized as legitimate, then the local network station should not be penalized by having an out-of-market significantly viewed digital signal imported into its market.

- Any waiver that is privately negotiated between a local network station and a satellite carrier is *not* subject to the Section 325 good-faith negotiation requirement.

- Section 341(b) precludes the retransmission of significantly viewed signals into the Palm Springs and Bakersfield DMAs.

- Because there is insufficient information at this time to fully implement Section 341(a), which appears to apply to Oregon, it may be premature to include the affected stations on the Significantly Viewed List at this time.

- The enforcement and notice provisions in Section 340(f) and (g) follow directly from the statutory language and should be adopted as proposed.

There are a number of issues, however, that the *Notice* does not address, for which the *Notice* does not offer a tentative conclusion but seeks comment, or for which NAB and Network Affiliates respectfully disagree with the *Notice*'s proposal. With respect to these issues, NAB and Network Affiliates suggest the following:

- The definitions of "full network station," "partial network station," and "independent station" in Section 76.5(j), (k), and (*l*) should be amended to track the definitions of "network station" and "superstation" in Section 119(d) of the Copyright Act. This amendment would cause Fox-owned and -affiliated stations to be treated for purposes of the significantly viewed rules the same as stations owned by or affiliated with the ABC, CBS, and NBC Networks.

- In light of the greater than 21 percent national penetration rate of DBS service, as well as of additional penetration by other non-cable MVPDs, it is no longer reasonable for the audience survey requirement in Section 76.54(b) to exclude only "cable" households. Accordingly, that rule should be amended to reflect today's universe of MVPD subscriber households by substituting "non-MVPD television homes" for "non-cable television homes" and by defining "MVPD" in Section 76.5.

- "Satellite community" should be defined as a "separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas)," as the Commission proposes in its second option. However, there should be an additional requirement that a petitioner seeking to designate a signal as significantly viewed in a satellite community should also be required to demonstrate, in addition to the requisite survey data, that the area

in which the survey data are collected constitutes a "community" in the sense explicated by the Commission in the Section 307(b) context, for which the Commission, over a period of several decades, has developed settled indicia of community status.

- Section 340(b)(1)'s explicit language creates a condition precedent to delivery of a duplicating significantly viewed out-of-market station: The statute clearly requires a subscriber to "receive" the local affiliate before receiving an out-of-market significantly viewed signal. The statute does not create exceptions for failure of the local affiliate and the satellite carrier to reach a retransmission consent agreement or otherwise.

- Although Section 340(b)(3) does not prevent a subscriber from receiving an out-of-market significantly viewed network signal simply because the local market does not have a local network station affiliated with the same network, the Commission does not reach a tentative conclusion on whether that exception affects the requirement that local-into-local service be offered by the satellite carrier, and received by the subscriber, before a significantly viewed signal can be imported and delivered to that subscriber. But the "receipt" requirement imposed by the compulsory license—that is, that the compulsory license does not apply unless a subscriber is *receiving* the local signal service pursuant to Section 122— applies regardless of whether a local market has an affiliate of a particular network. Thus, a satellite carrier may not retransmit an out-of-market significantly viewed signal into *any* market in which it does not provide local signal service.

- Section 340(b)(2)(B) and its concepts of "equivalent bandwidth" and "entire bandwidth" should be interpreted to prohibit satellite carriers from using technological means, including compression techniques, to discriminate against local digital signals or otherwise to favor significantly viewed distant digital signals. This principle of nondiscrimination should also encompass material degradation; functionalities, such as interactivity; and hours of HD programming across dayparts and in total.

- The Section 340 waiver provision requiring that waivers be "affirmatively granted" takes precedence over the Section 119 waiver provision that requires a local network station to respond within 30 days of the request or the waiver request is deemed granted. Similarly, the sunset provision in Section 119 takes precedence over the lack of a sunset provision in Section 340.

- It is premature to identify or specify circumstances that would generally warrant a finding of bad faith or frivolousness in the order in this proceeding, and the Commission should, instead, await to determine in a particular case whether any particular factual circumstance that is presented to it for adjudication amounts to bad faith or frivolousness.

For the reasons set forth below, NAB and Network Affiliates respectfully request that the Commission implement SHVERA's significantly viewed provisions as explained herein.

* * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004	)	MB Docket No. 05-49
	)	
	)	
Implementation of Section 340 of the Communications Act	)	
	)	

JOINT COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS
AND OF THE
ABC, CBS, FBC, AND NBC
TELEVISION AFFILIATE ASSOCIATIONS

The National Association of Broadcasters ("NAB") and the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates") (jointly, "NAB and Network Affiliates"), by their attorneys, hereby file these comments in response to the *Notice of Proposed Rule Making* ("*Notice*"), FCC 05-24, released by the Commission on February 7, 2005, in the above-referenced proceeding.[1]

The Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA")[2] provides satellite carriers, *inter alia,* an expanded compulsory copyright license to allow satellite delivery of a television broadcast station's signal outside the station's DMA to satellite subscribers

[1] NAB is a nonprofit, incorporated association of radio and television broadcast stations that serves and represents the American broadcast industry. The Network Affiliates collectively represent approximately 800 local television stations affiliated with the ABC, CBS, Fox, and NBC Television Networks.

[2] Pub. L. No. 108-447, Div. J, Tit. IX (2004), at § 202.

located in communities where the station is "significantly viewed." SHVERA created a new Section 340 of the Communications Act and directed the Commission to adopt rules to implement SHVERA's new significantly viewed provisions. The *Notice* invites comment on various issues triggered by the implementation of SHVERA's significantly viewed provisions and on specific rules the Commission is considering for this purpose.

Cable operators have long had both a compulsory copyright license and Commission regulatory authority to deliver the signal of a television station, with its consent, outside the station's DMA to cable subscribers in areas where the signal is significantly viewed. The significantly viewed concept was developed to reflect the extent to which the signal was available over the air and was, in fact, being viewed in non-cable homes. SHVERA attempts both to harmonize the "significantly viewed" copyright scheme for cable operators and satellite carriers and to harmonize the Commission's regulatory scheme for significantly viewed signals to the extent practicable, given differences in the two technologies. While it is clear that Congress intended, to the extent feasible, to achieve regulatory parity between cable and satellite,[3] it is equally clear that it was the intent of Congress to protect "localism" and not to disadvantage local broadcast stations:

> Congress has historically sought to balance the interests of the public in having continued access to free, local programming with a desire by some consumers to pay to view additional stations. In achieving equilibrium, it is *critical* that Congress not compromise the legitimate interests of intellectual property holders nor *sacrifice long-term competitive interests by unfairly favoring one industry over another.*[4]

Accordingly, in implementing Section 340 the Commission should be guided by the twin policy

---

[3] *See* H.R. REP. 108-634 (2004), at 11.

[4] H.R. REP. 108-660 (2004), at 9 (emphases added); *see also* H.R. REP. 108-634, at 12 (stating that certain provisions are intended "to protect and promote localism").

goals of achieving, to the extent possible, regulatory parity between cable and satellite while not harming local broadcast stations.

I. "Housekeeping" Amendments to Section 76.54

The Commission proposes several "housekeeping" amendments to Section 76.54, the heart of its "significantly viewed" rules. The *Notice* proposes to revise Section 76.54 to extend it to satellite carriers, update the existing reference to "Grade B contour," eliminate an outdated reference, and correct a typographical error. But the Commission expresses concern that the rules in effect on April 15, 1976, strictly govern the extension of the "significantly viewed" regime to satellite carriers.[5] The housekeeping amendments proposed in paragraph 20 of the *Notice* are straightforward, however, and do not violate either the language or spirit of SHVERA. Accordingly, it is appropriate for the Commission to adopt the "housekeeping" amendments it has proposed for Section 76.54. In the same vein, the proposal to specify the "noise limited service contour" for a digital television signal is also appropriate. SHVERA does contemplate independent significantly viewed status for digital signals, and the "noise limited service contour" is the relevant contour for a digital signal equivalent to the Grade B contour of an analog signal.[6] In addition, NAB and

---

[5] *See Notice* at ¶ 20.

[6] *See, e.g.*, *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588 (1997), at ¶ 199 ("The service area of an individual NTSC station is defined as the area within the station's Grade B service contour, reduced by any interference; and is computed based upon the actual transmitter location, power, and antenna height. The service area of a DTV station is defined as the area contained within the station's noise-limited service contour, reduced by the interference within that contour. DTV coverage calculations assume locations and antenna heights identical to those of the replicated companion NTSC station and power generally sufficient to achieve noise-limited coverage equal to the companion station's Grade B coverage.")

Network Affiliates agree with the *Notice*'s tentative conclusion that a DTV-only station must petition for significantly viewed status pursuant to the requirements in Section 76.54.[7] Finally, the process for seeking significantly viewed status for satellite delivery of out-of-market signals should be no different than it is for cable, and the process established in existing Sections 76.5 and 76.7 should apply.

II. Definition of "Network Station"

The *Notice* points out inconsistencies between the Commission's regulatory scheme and definitions of "full network station," "partial network station," and "independent station" and SHVERA's reliance on copyright law definitions of "network station" and "superstation."[8] A conspicuous inconsistency is that stations owned by Fox or affiliated with the Fox Network are treated as "independent stations" under the Commission's definitions in Section 76.5, and not as network stations, whereas these stations are treated as "network stations" under the Section 119 definition, the same as stations owned by or affiliated with one of the other three major television networks (ABC, CBS, and NBC). Consequently, NAB and Network Affiliates urge the Commission to amend the definitions in its rules to more closely conform with Section 119. The Commission's definitions are relics of a former era when there were only three television networks, and it is hardly appropriate in today's television marketplace to treat Fox-owned or -affiliated stations differently in this respect than stations owned by or affiliated with the ABC, CBS, and NBC Networks. No part

---

[7] *See Notice* at ¶ 20 & n.62 (citing *Carriage of Digital Broadcast Signals*, 16 FCC Rcd 2598 (2001), at ¶ 100).

[8] *See Notice* at ¶¶ 21-23 (comparing 47 C.F.R. § 76.5(j), (k), (*l*) with 17 U.S.C. § 119(d)(2), (d)(9)).

of SHVERA expressly prohibits the Commission from amending its rules; there is no time restriction in Section 340 of the Communications Act whatsoever; and, moreover, Section 340(a)(2) makes clear that its concern is parity for satellite with the "same standards and procedures concerning *shares of viewing hours and audience surveys*" used in the cable context, not for the perpetuation of a "network station" parity that no longer reflects the current marketplace. Furthermore, the Copyright Act itself contains the definitions of "network station" and "superstation" that are inconsistent with the Commission's current definitions in Section 76.5, and, in order to harmonize the two schemes, NAB and Network Affiliates are proposing that the Commission essentially adopt the Copyright Act definitions, but mold them slightly to maintain the remaining consistency in the existing rules. The advantages of such an amendment include the following:

- Modernization of the Commisson's rules and definitions to reflect current marketplace conditions.
- Harmonization of the Commission's rules with relevant copyright law.
- Definition of "network station" that is not static, but dynamic and capable of reaching stations as new networks develop and mature that satisfy the definitional criteria.
- Parity between cable and satellite since all of the rules in Part 76 pertaining to both cable and satellite will be governed by these new, consistent definitions.

NAB and Network Affiliates suggest that the definitions in Section 76.5 hew closely to the relevant definitions in Section 119(d) of the Copyright Act, except that (i) noncommercial stations and translator stations should continue to be excluded from the significantly viewed regime; (ii) accommodation should be made for the concept of "partial network station" whose concept appears to remain important to the significantly viewed definition and standards set forth in

Section 76.5(i)[9]; (iii) "television network" should be defined to comport with the "partial network station" definition; and (iv) "independent station" should continue to be defined, rather than "superstation," but the definition should parallel the "superstation" definition (except for the exclusion of noncommercial stations). Specifically, the following rule amendments implement this proposal:

> (j) *Full network station*. A commercial television station, including any terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States and which broadcasts the programming of such network(s) for 15 or more hours per week.
>
> (k) *Partial network station*. A commercial television station, including any terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States and which broadcasts the programming of such network(s) for less than 15 hours per week.
>
> (*l*) *Independent station*. A commercial television station other than a full network station.
>
> [. . .]
>
> (rr) *Television network.* A television network in the United States which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States.

These amendments to the Commission's Part 76 definitions should apply prospectively only. That is, a station already listed on the Significantly Viewed List would not have to requalify. However, any petitioner seeking to demonstrate that a Fox-owned or -affiliated station is

---

[9] The concept of "partial network station" does not appear in the copyright definitions, and NAB and Network Affiliates acknowledge that its continued inclusion diminishes the parity in the two schemes. If the Commission were to determine that "partial network station" has no continued relevance to the significantly viewed scheme, it could repeal this definition altogether. However, Section 76.5(i) makes reference to "partial network station" and subjects such a station to the same threshold showing as a "full network station."

significantly viewed in a community would have to satisfy the higher viewing threshold for network stations rather than the lower threshold for independent stations. The same threshold would apply where a petitioner seeks to demonstrate that a signal is no longer significantly viewed in a community.

If the Commission adopted this proposal, the scope of the compulsory copyright license in Section 119(a)(3) would not be jeopardized. *First*, all stations already listed on the Significantly Viewed List would satisfy the compulsory license as enacted. And *second*, any Fox-owned or -affiliated station that, prospectively, satisfies the higher viewing threshold for network stations would also have satisfied the lower viewing threshold for independent stations and, thus, would plainly be eligible for the compulsory license. By contrast, were the definitions amended to make it easier for a signal to be determined to be significantly viewed, that would violate the intent and language of the compulsory license.

For all of these reasons, NAB and Network Affiliates request that the Commission amend and update these definitions to reflect the current competitive television marketplace. However, should the Commission ultimately determine not to adopt these definitions at this time, then NAB and Network Affiliates agree that, in applying the significantly viewed rules to satellite carriage of stations, a resolution of the inconsistences is the Commission's proposal to utilize its current definitions for purposes of determining whether a station is significantly viewed and to use the Copyright Act definitions for purposes of determining subscriber eligibility and related provisions.

III. Limitations on Carriage of Significantly Viewed Signals Based on Program Exclusivity

As the *Notice* correctly states, the Commission's cable rules contain various exceptions to

a station's program exclusivity protections. Under these exceptions, cable operators are not required to delete duplicating signals of significantly viewed out-of-market stations within a local station's relevant zone of protection (35 or 55 miles from the local station's community of license).[10] However, the Commission has established a procedure that permits local broadcast stations or program suppliers to effectively "de-list" a station from the Significantly Viewed List through a "waiver" process. Under this procedure, a station remains on the Significantly Viewed List, but cable operators are not permitted to rely on the exception(s) if the local broadcast station or the program supplier successfully petitions for waiver of the exception(s) by showing that the signal is no longer significantly viewed.[11] The Commission's newly published Significantly Viewed List marks with a pound (#) sign the communities in which these "de-listing" waivers have been granted.

In new Section 340(e), it is clear that Congress intended that the procedure currently applied to cable for "de-listing" waivers also be applied to satellite carriers:

> Section 340(e) allows the FCC to apply its network non-duplication and syndicated exclusivity rules to "remove" stations from the significantly viewed list as applied to satellite operators in a similar manner as it currently does with cable operators. . . .
>
> . . . Section 340(e)(1) is intended to give the FCC authority to apply the network non-duplication and syndicated exclusivity rules to distant signals of network or non-network stations in a way that replicates, where and when appropriate, the way the FCC "removes" signals from the significantly viewed list for cable.[12]

While the Commission's proposal to enable broadcast stations or program suppliers to petition the

---

[10] *See* 47 C.F.R. § 76.92(f) (network nonduplication exception); *id*., § 76.106(a) (syndex exception).

[11] *See, e.g.*, *KCST-TV, Inc.*, 103 FCC 2d 407 (1986); *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990); *KSWB, Inc.*, 13 FCC Rcd 15470 (1998); *Benedek License Corp*., 17 FCC Rcd 25232 (2002).

[12] H.R. REP. 108-634, at 14-15.

Commission for waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules for satellite carriers comports with congressional intent,[13] there is an anachronism in the Commission's current rules that should be addressed. Under the existing rules, significantly viewed status is "demonstrated by an independent professional audience survey of *non-cable* television homes."[14] The original intent of this provision when cable was the only MVPD was to require that the audience survey include only those households that were capable of receiving, and were, in fact, receiving, broadcast signals over the air so that cable subscribers were able to view the same broadcast signals as their neighbors who did not subscribe to cable. Now that DBS service alone has a national penetration rate greater than 21 percent, not to mention the additional penetration by other non-cable MVPDs, it is no longer appropriate to exclude only "cable" households from the audience survey.

NAB and Network Affiliates recommend that, in the interest of fairness, the audience survey required for both cable and satellite significantly viewed determinations should include only those households that receive broadcast service over the air. Thus, the survey in each case would exclude all "MVPD" households—not only "cable" households. This is important if the satellite carriage rules are to be harmonized with the cable rules. Otherwise, if a local broadcast station or program supplier has petitioned for a "de-listing" waiver in a satellite community where a satellite carrier is importing an out-of-market significantly viewed signal, the share and net weekly circulation of the out-of-market significantly viewed station will be artificially inflated if satellite subscriber households are included in the audience survey. That, in turn, could deprive local broadcast stations

---

[13] *See Notice* at ¶¶ 24-27.

[14] 47 C.F.R. § 76.54(b) (emphasis added).

and program suppliers of program exclusivity protections to which they otherwise would be entitled and frustrate a core policy objective that SHVERA and the Commission's rules are designed to achieve.

This problem can easily be fixed by amending the survey standard in Section 76.54(b) to reflect today's universe of MVPD subscriber households. Specifically, the Commission could substitute "non-MVPD television homes" for "non-cable television homes" and define "MVPD" in Section 76.5.[15]

In short, NAB and Affiliates agree with the Commission's proposal to harmonize out-of-market satellite carriage of significantly viewed stations with the comparable cable carriage provisions with a modification, as noted, that would require audience surveys to exclude all MVPD households.

IV. Definition of "Satellite Community"

The *Notice* correctly observes that the concept of "community" is important for implementation of Section 340 because the term describes the geographic area in which subscribers will be permitted to receive significantly viewed signals.[16]

The Commission suggests, however, that the general concept of "community" is not transferable between the cable and satellite contexts. The *Notice* states that the "concept of cable

---

[15] Although the definition of "significantly viewed" in Section 76.5(i) also relies on the concept of viewing in non-cable households, *see* 47 C.F.R. § 76.5(i) (defining "significantly viewed" as "[v]iewed in other than cable television households"), if the audience survey examines only non-MVPD television households, then, by definition, all viewing would be of broadcast signals received over the air and the fact that the share and net weekly circulation percentages set forth in Section 76.5(i) are to be measured only in non-cable households is irrelevant.

[16] *See Notice* at ¶ 28.

community is largely inapplicable to the satellite context" and distinguishes the more local character of cable systems from the national service of satellite carriers.[17] While it is true that Section 340 distinguishes between a cable community and a satellite community,[18] that distinction does not necessarily rest upon the notion of different indicia of community status in the two contexts.[19] Instead, the distinction exists only to allow the significantly viewed regime for satellite to be applied in communities where cable service is not offered (and, hence, are not "cable" communities). If Section 340 is to be implemented to create regulatory parity between cable and satellite—while not

---

[17] *Notice* at ¶ 30.

[18] *See* 47 U.S.C. § 340(i)(3).

[19] Indeed, the Commission's rules do not define "cable community." Instead, the rules define a "community unit," which is a technical definition deriving from the nature of a cable television system: "A cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas)." 47 C.F.R. § 76.5(dd). The Commission has explicated what is meant by community in this context as follows:

> The meaning of the term "community" as used in the Rules is a matter which we have indicated must be determined on a case-by-case basis depending on the circumstances involved. *See* Second Report and Order in Docket 15971, FCC 66-220, 2 FCC 2d 725, para. 149 (1966). The definition is usually coincident with a municipal boundary, but that is not always the case. *See Telerama, Inc.*, 3 FCC 2d 585 (1966) and *Mission Cable TV, Inc.*, 4 FCC 2d 236 (1966) (the cases cited in the note to the present cable television system definition). *See also Calvert Telecommunications Corp.*, FCC 74-1095, 49 FCC 2d 200 (1974). Because the term community is used in Section 307(b) of the Communications Act there has been some judicial and Commission discussion of the meaning of the term as used in that context. *See, e.g.*, *St. Louis Telecast, Inc.*, FCC 57-294, 12 RR 1289, 1369 (1957).

Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems, 63 FCC 2d 956 (1977), at ¶ 22 n.5

harming local broadcast stations—then the basic indicia of community status must be largely the same, regardless of the context.

Thus, the Commission is correct, notwithstanding its suggestion of the inapplicability of the concept of "cable community" to the satellite context, that the meaning of "community" must be the same where communities and counties are already set forth on the Commission's Significantly Viewed List.[20] In other words, the statutory requirement that satellite carriers use the same significantly viewed list as cable operators demonstrates that Congress intended for the geographic areas in which MVPDs could retransmit significantly viewed signals to be identical where those geographic areas have already been specified. This is the only way to harmonize the two regimes.

It then follows that the Commission's proposal to define "satellite community" in terms of its first approach of utilizing five-digit zip codes violates the directive to maintain parity.[21] There is no corresponding concept of zip codes in the cable context, and it would create a competitive imbalance between the two industries to permit satellite delivery of significantly viewed signals in a "community" which has no meaning or legal significance for cable systems—and never will. Moreover, the Commission itself recognizes some of the other shortcomings of this approach, pointing out that it may ignore existing communities in the traditional sense or create artificial communities, as well as having no applicability if a cable operator ever does come to town, as there is no town under this scheme that the cable operator could come to.[22] The Commission's second option, defining "satellite community" as a "separate and distinct community or municipal entity

---

[20] *See Notice* at ¶ 30.

[21] *See Notice* at ¶ 31.

[22] *See Notice* at ¶ 32.

(including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas)" is much preferred.[23] It tracks the concept of community used in the Commission's definition of "community unit" in the cable context exactly and, therefore, maintains regulatory parity.[24]

What is needed to supplement the *Notice*'s second option, however, is an approach consistent with the concept of community as the Commission has been dealing with it for decades pursuant to Section 307(b) of the Communications Act. The long-standing regulatory treatment of this concept provides a settled basis for indicia of community status. The Commission has applied this concept of community, time and again, on a case-by-case basis in the broadcast allocations context. Indeed, recently the Commission summarized the definition as follows:

> The Commission has defined "communities" as geographically identifiable population groupings, which have common local interests. This requirement is generally satisfied if the proposed community is either incorporated or listed in the U.S. Census. The key ingredient in determining the existence of a community is the presence of a community of interest associated with an identifiable population grouping. . . . The principal test is whether the residents function as and conceive of themselves as a community around which their interests coalesce. This may be proven by direct testimony of residents of the locality or by "indicia of community." Incorporation is not a prerequisite to community status. The specified location must be an identifiable population grouping separate and apart from all others, and the geographic boundaries of the location must not enclose or contain areas or populations more logically identified as or associated with some other location.[25]

---

[23] *Notice* at ¶ 32.

[24] *See* 47 C.F.R. § 76.5(dd).

[25] *Fortuna Foothills and Wellton, Arizona*, 19 FCC Rcd 4619 (2004), at ¶ 6 (citations omitted). Although the Commission has employed an expanded definition of community in television assignment cases, to include, for instance, metropolitan areas as well, *see, e.g.*, *Bessemer*
(continued...)

There is no good reason to treat "community" under Section 340 any different than it is treated under Section 307(b). Thus, the Commission's proposed definition of "satellite community" in new Section 76.5(gg) (Option Two) works as a definitional matter, so long as the Commission makes clear in its order that a petitioner seeking to designate a signal as significantly viewed in a satellite community shall also be required to demonstrate, in addition to the requisite survey data, that the area in which the survey data are collected constitutes a "community" consistent with Section 307(b). Just because a satellite carrier has the capability to provide service to a random area bounded only by the outlines on a five-digit postal zip code map does not make that random area a "community" in the sense that Congress intended or that the Commission has previously recognized.[26] Local broadcast stations should not be subject to random "Swiss-cheesing" of their program exclusivity rights, unless the residents in the purported satellite community function as and conceive of themselves as a community and for which it otherwise makes sense to have an out-of-market signal designated as significantly viewed.[27]

---

[25](...continued)
and Tuscaloosa, Alabama, 5 FCC Rcd 669 (1990), at ¶ 12, the issue in the instant context does not involve potentially larger areas that may be communities (cable service is undoubtedly, without exception, available in such metropolitan areas) but communities so small or remote that it has, to date, been economically infeasible for cable operators to provide service to those areas but not for satellite carriers with their far larger CONUS or spot beam satellite coverage.

[26] Through geocoding, satellite carriers have the technical capability of delivering a significantly viewed signal only to those subscribers in the significantly viewed satellite community. Satellite carriers are, accordingly, not constrained by any necessity to use only zip codes. Geocoding of subscriber household addresses for significantly viewed signals works identically to geocoding of subscriber household addresses for delivery of distant network signals to "unserved" households in white areas, which satellite carriers have been successfully doing for many years.

[27] Another problem of a zip code definition of satellite community is that it could permit satellite carriers to gerrymander a purported "satellite community" by cherry-picking just those zip codes with the requisite audience share, ignoring all sensible and traditional political and (continued...)

V. Definition of "Satellite Carrier"

There is no policy reason or statutory basis to think that Congress intended that some parties, by creating a species of satellite carrier or through some business arrangement, such as transponder leasing, could avoid the Commission's significantly viewed rules but not others. Consequently, NAB and Network Affiliates agree with the Commission's tentative conclusion that the definition of "satellite carrier" must reach entities that own and operate their own satellite facilities, entities that lease capacity from another entity that is licensed to provide service, and entities using a non-U.S. licensed satellite to provide service pursuant to a blanket earth station license.[28]

VI. Analog Service Limitations

SHVERA prohibits satellite delivery to subscribers of a significantly viewed analog signal unless the subscriber first receives local-into-local analog service. Section 340(b)(1) of the Communications Act provides as follows:

> With respect to a signal that originates as an analog signal of a network station, this section shall apply only to retransmissions to subscribers of a satellite carrier who *receive* retransmissions of a signal that originates as an analog signal of a local network station from that satellite carrier pursuant to Section 338.[29]

At the same time, new Section 119(a)(3)(B) of the Copyright Act provides that the compulsory copyright license is available

---

[27](...continued)
geographical boundaries. There is no basis to think that Congress intended such a scheme that could so harm both local broadcast stations and cable operators.

[28] *See Notice* at ¶ 35.

[29] 47 U.S.C. § 340(b)(1) (emphasis added).

> only to secondary retransmissions of the primary transmissions of network stations and superstations to subscribers who *receive* secondary transmissions from a satellite carrier pursuant to the statutory license under Section 122.[30]

Read together, these SHVERA provisions restrict subscriber eligibility for significantly viewed signals to subscribers who first *subscribe to and receive* local-into-local service. Although Section 340 refers only to network stations, the compulsory copyright license refers to both network stations and superstations. Therefore, a satellite carrier may not use the compulsory copyright license to offer significantly viewed signals to a subscriber unless that subscriber first *receives* the local signal service consisting of both network stations and superstations. Furthermore, because SHVERA requires receipt of the local signals as a condition precedent to the receipt of a significantly viewed signal, it follows, *a fortiori*, that a satellite carrier cannot retransmit an out-of-market significantly viewed signal to any subscriber to whom it does not provide local signal service. Moreover, Section 338 and Section 122 pertain to *satellite retransmission* of local signals, so a satellite subscriber "receiving" local signals over the air, even if by means of an antenna that is integrated with the satellite dish, is not eligible to receive a significantly viewed signal.

The Commission tentatively concludes in paragraph 39 of the *Notice* that (a) a subscriber receiving local-into-local service in a market qualifies for out-of-market significantly viewed signals if the local stations retransmitted by the satellite carrier fails to include an affiliate of the network with which a significantly viewed station is affiliated and (b) a subscriber should not be denied access to a significantly viewed signal if the local station refused to grant retransmission consent or otherwise is not carried. Section 340(b)(1)'s explicit language to the contrary could not be clearer.

---

[30] 17 U.S.C. § 119(a)(3)(B) (emphasis added).

A condition precedent to delivery of a duplicating significantly viewed out-of-market station is that a subscriber "receive" the local affiliate. The statute does not create exceptions for failure of the local affiliate and the satellite carrier to reach a retransmission consent agreement or otherwise. Nor can the Commission read such an exception into the statute. The purpose of this provision is to protect localism and to prevent satellite carriers from by-passing local stations or using the threat of delivery of out-of-market stations to extract more favorable retransmission consent terms.[31] The Commission may not ascribe to the statute a meaning and result plainly at odds with the stated will of Congress.

The Commission does not reach a tentative conclusion on whether the exception in Section 340(b)(3),[32] which allows a subscriber to receive an out-of-market significantly viewed network signal if the local market does not have a local station affiliated with the same network, affects the requirement that local-into-local service be offered by the satellite carrier, and received by the subscriber, before a significantly viewed signal may be imported and subsequently received by that subscriber.[33] The Commission correctly notes that the compulsory copyright license portion of SHVERA does not contain a similar exception. It must follow, then, as a matter of statutory construction, that the "receipt" requirement imposed by the compulsory license applies regardless of whether a local market has an affiliate of a particular network. Furthermore, because cable service is available in every market and cable carries the local stations, to maintain regulatory parity satellite carriers should not be permitted to offer significantly viewed signals in markets where they are not

---

[31] *See* H.R. REP. 108-634, at 12 (explaining that Sections 340(b)(1) and 340(b)(2)(A) were intended "to protect and promote localism").

[32] 47 U.S.C. § 340(b)(3).

[33] *See Notice* at ¶ 48.

also providing local signal service. In short, and as shown above, a satellite carrier may not retransmit an out-of-market significantly viewed signal into *any* market in which it does not provide local signal service.

VII. Digital Service Limitations

As in the case of a significantly viewed analog signal, to be eligible to receive an out-of-market network station's significantly viewed digital signal, a satellite subscriber must receive a digital signal from a local station affiliated with the same network via satellite.[34] In addition, SHVERA includes certain "bandwidth" requirements for the retransmission of a local network station's digital signal when a satellite carrier chooses to retransmit the significantly viewed digital signal of an out-of-market network station. Specifically, a satellite carrier's retransmission of a local network station's digital signal must either (1) occupy "at least the equivalent bandwidth as the [out-of-market] digital signal retransmitted" or (2) comprise "the entire bandwidth of the digital signal broadcast by such local network station."[35] Through these provisions, Congress intended to prevent satellite carriers from using technological means to discriminate against local digital signals vis-à-vis out-of-market significantly viewed digital signals.

The Commission should apply Section 340(b)(2)(B), and its concepts of "equivalent bandwidth" and "entire bandwidth," to prohibit satellite carriers from using technological means, including compression techniques, to discriminate against local digital signals or otherwise to favor

---

[34] *See* 47 U.S.C. § 340(b)(2)(A).

[35] 47 U.S.C. § 340(b)(2)(B).

significantly viewed distant digital signals.[36] As discussed above, Congress intended SHVERA to protect localism and not to harm local broadcast stations.[37] The Commission, therefore, should interpret Section 340(b)(2)(B) to further this overarching congressional goal.

In addition, satellite carriers are not permitted to materially degrade the signals of local commercial television stations. Section 338 required the Commission, when adopting regulations concerning satellite carriers' carriage of local television signals, to issue regulations including "requirements on satellite carriers that are comparable to the requirements on cable operators under sections 534(b)(3) and (4)."[38] Section 534(b)(4) of the Act requires cable operators to carry the signals of local commercial television stations "without material degradation."[39] Thus, satellite carriers are prohibited from materially degrading the signals of local commercial television stations (including high definition signals) they retransmit[40] *and* must comply with the new "bandwidth"

---

[36] *See Notice* at ¶ 45 (seeking comment on these issues); *see also* H.R. REP. 108-634, at 12 (stating that Section 340(b)(2)(B) was designed by Congress to prevent satellite carriage of local network stations' digital signals "in a less robust format" than the significantly viewed digital signals of an out-of-market network affiliate).

[37] *See* H.R. REP. 108-634, at 12 (explaining that Sections 340(b)(1) and 340(b)(2)(A) were intended "to protect and promote localism"); *see also* H.R. REP. 108-660, at 9.

[38] 47 U.S.C. § 338(g).

[39] 47 U.S.C. § 534(b)(4).

[40] While the Commission has yet to address pending petitions for reconsideration concerning the exact parameters of this material degradation prohibition in the context of cable, *see Carriage of Digital Television Broadcast Signals*, Second Report and Order and First Order on Reconsideration, FCC 05-27 (Feb. 23, 2005), at ¶ 1 n.4, the principle is clear—satellite carriers will be subject to a "comparable" prohibition against the material degradation of the signals of local television stations. *See* 47 U.S.C. § 338(g). Moreover, the FCC has already clearly determined that "a broadcast signal delivered in HDTV must be carried" by the cable operator "in HDTV." *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 2598, 2629 (2001).

requirements of SHVERA.

In adopting rules that apply the principle of nondiscrimination and the concepts of "equivalent bandwidth" and "entire bandwidth," it may not be possible at this point to anticipate every single circumstance in which a satellite carrier could conceivably use technological means to treat a local digital signal less favorably than a significantly viewed distant digital signal. It would, however, be useful for the Commission to provide "bright line" examples of unacceptable practices. For example, it would clearly violate the principle of "equivalence" if a local station's digital signal were retransmitted in a lesser standard or format than the distant digital signal. If the digital signals of both the local station and the significantly viewed distant station were high definition ("HD"), then equivalence would demand that, if the satellite carrier chooses to retransmit the HD signal of the out-of-market station, it must retransmit the local station's signal in HD as well. And if the local station were broadcasting six standard definition ("SD") streams, rather than an HD signal, then, in order for the satellite carrier to retransmit an out-of-market signal in HD, the satellite carrier would need to retransmit all six of the local station's SD streams to satisfy the "equivalent bandwidth" requirement.[41]

As the Commission specifically recognizes, compression technologies could obviously be

[41] It may become possible, with future technological improvements, for a station to broadcast seven or eight SD streams on a digital channel. In that case, equivalence would require that a satellite carrier retransmit all seven or eight SD streams if it chooses to retransmit the significantly viewed signal in HD. A local station, however, may broadcast only two, three, or four SD streams on its digital channel, rather than the "maximum" of six (or more). In that case, a satellite carrier would be required to retransmit each of those multicast streams (whether two, three, or four) under the "entire bandwidth" requirement of Section 340(b)(2)(B)(ii) in order to be allowed to retransmit the out-of-market signal in HD.

used to discriminate against local network stations.[42] As a practical matter, nondiscrimination in the use of compression technology should mean that a satellite carrier cannot utilize compression techniques so that the viewers of a local station fail to receive video and audio quality comparable to the quality received by viewers of an out-of-market station.

The principle of nondiscrimination must also apply with regard to functionalities. For example, a satellite carrier should not be permitted to retransmit the interactive functionality of a significantly viewed distant digital signal while failing to retransmit that same functionality offered by a local station. If both the local network station and the out-of-market station offer interactivity, then a satellite carrier must be required to retransmit the interactive functionalities of the local station if it chooses to retransmit the functionalities of the significantly viewed signal.

Discrimination occurring by means of timing decisions should also be prohibited. For example, in applying the principles of nondiscrimination and "equivalence" in the context of differing dayparts, assume that a local digital station airs an HD signal during a portion of the day (such as prime time) and airs an SD signal the remainder of the day, which may or may not be multiplexed at various times during the day. Assume further that a significantly viewed distant station similarly broadcasts an HD signal during a portion of the day and an SD signal the remainder of the day. It would clearly be discriminatory for a satellite carrier to retransmit the prime time schedule of the out-of-market station in HD but fail to retransmit the prime time programming of the local station in HD.[43] The Commission, therefore, must account for the fact that discrimination could

---

[42] *See Notice* at ¶ 46 (inquiring about compression techniques).

[43] Discrimination could be evident even if the satellite carrier were to retransmit in HD the same number of total hours per day of the local station's programming. For example, the retransmission of three hours of HD programming of a local station during the very early morning (continued...)

occur—and must be prohibited—with regard to how local and distant signals are retransmitted during different dayparts, especially the most important dayparts such as prime time and prime access (the period in which local news is often aired).[44] Any interpretation of Section 340(b)(2)(B) must make clear that satellite carriers cannot discriminate against local stations by retransmitting significantly viewed signals in a more favorable format or standard, even if only for a limited part of the day.

VIII. Exception Where Local Network Station Is Not Broadcasting in Digital

Where a local network station is not broadcasting in a digital format, for reasons the Commission has recognized as legitimate by extending the station's DTV construction deadline (including, but not limited to, lack of international coordination or approval, zoning clearance failures, or environmental impediments), then the local network station should not be penalized by having an out-of-market significantly viewed digital signal imported into its market. If local-into-local satellite service is being provided in analog format in the local market and received by subscribers, the satellite carrier would not be prohibited in these circumstances from bringing in the out-of-market significantly viewed analog signal, just the out-of-market digital signal. The Commission's interpretation comports with congressional intent, and NAB and Network Affiliates

---

[43](...continued)
hours (say from 2:00 a.m. to 5:00 a.m.), while retransmitting the out-of-market HD signal during three hours of prime time, would clearly be discriminatory.

[44] It would also be discriminatory if an out-of-market signal is retransmitted in HD for a greater number of hours per day than the local signal. Even a relatively small difference in the number of HD hours would be discriminatory if that difference occurred in particularly important parts of the viewing day, such as prime time or prime access.

agree with the *Notice*'s tentative conclusion.[45]

IX. Privately Negotiated Waivers

A significantly viewed signal cannot be retransmitted to a satellite subscriber unless a satellite carrier can satisfy *both* the Communications Act and Copyright Act provisions governing the retransmission of the signal. These statutory requirements may be tempered, however, by the ability of a local station to grant a waiver that would permit the importation of an out-of-market significantly viewed signal into its local market notwithstanding a failure of a satellite carrier to satisfy the requirements. The Communications Act and the Copyright Act both contain such waiver provisions, but they are not identical. The waiver provision in Section 340(b)(4) prohibits otherwise unlawful retransmission of a significantly viewed signal unless the affected local network station "has privately negotiated and *affirmatively granted* a waiver from the requirements of [47 U.S.C. § 340(b)(1) or (2)] to such satellite carrier."[46] In contrast, the waiver provision in Section 119(a)(3)(C) permits a subscriber to request a waiver, through the subscriber's satellite carrier, from the affected local network station and further provides that

> [t]he network station shall accept or reject the subscriber's request for a waiver within 30 days after receipt of the request. If the network station fails to accept or reject the subscriber's request for a waiver within that 30-day period, that network station shall be deemed to agree to the waiver request.[47]

In addition, the Section 119(a)(3)(C) waiver provision terminates, and terminates all existing

---

[45] *See Notice* at ¶ 49 & n.133 (citing legislative history).

[46] 47 U.S.C. § 340(b)(4) (emphasis added).

[47] 17 U.S.C. § 119(a)(3)(C)(i).

waivers, as of December 31, 2008.[48] However, there is no similar sunset in the Section 340(b)(4) waiver provision.

Because a satellite carrier must always comply with the requirements of both the Communications Act and the Copyright Act, these differences in the two waiver provisions must mean that the satellite carrier must always satisfy the more stringent of the two provisions. This requires, first, that the Section 340 requirement that waivers be "affirmatively granted" trump the Section 119 requirement that requires a local network station to respond within 30 days of the request or the waiver request is deemed granted. If a satellite carrier relied solely upon the failure by a local network station to respond within 30 days to a waiver request, the waiver would not have been "affirmatively granted," and the satellite carrier would be in violation of the Communications Act and subject to the enforcement provisions in Section 340(f). Similarly, the sunset provision in Section 119 trumps the lack of a sunset provision in Section 340. If a satellite carrier presumed to retransmit a significantly viewed signal pursuant to a privately negotiated waiver after December 31, 2008, then it would be doing so without a compulsory license, and the carrier would be subject to the liability provisions in Section 119(a)(7) and in Section 501 of the Copyright Act by the copyright holder(s). The *Notice* does not appear to recognize these strictures.[49]

In addition, any waiver privately negotiated between a local network station and a satellite carrier is *not* subject to the Section 325 good-faith negotiation requirement. Such a waiver does *not* pertain to retransmission consent for the signal of the station that would be granting the waiver and

---

[48] 17 U.S.C. § 119(a)(3)(C)(ii).

[49] *See Notice* at ¶ 51 (seeking comment on the effect of the Section 119(a)(3)(C) waiver provision on the Section 340(b)(4) waiver provision).

so does not fall within the Section 325(b)(3)(C) good faith negotiation requirement. This plain statutory reading is confirmed by the legislative history which states: "Nor does the Committee intend such waivers or agreements to be subject to the Section 325 good-faith negotiation requirement."[50]

X. Special Rules for Certain Counties and Markets

New Section 341(b) prevents a satellite carrier from retransmitting "the signal of a television station into an adjacent local market that is comprised only of a portion of a county, other than to unserved households located in that county."[51] The Commission has properly interpreted this provision to preclude the retransmission of significantly viewed signals into the Palm Springs and Bakersfield DMAs.[52] These are the only DMAs that satisfy the provision. The provision is intended to protect localism in these two markets, which are substantially smaller than the Los Angeles market which overshadows them, especially given that many Los Angeles stations were deemed significantly viewed in these counties at a time when there was otherwise little indigenous over-the-air television broadcast service in these areas in the early 1970s.

Similarly, Section 341(a) contains a provision that appears to apply, and be limited to, Oregon. While the statute provides information sufficient to identify the counties affected (which appear to be Wallowa, Umatilla, Grant, and Malheur), there is insufficient information to identify specifically which stations might qualify under this provision. Consequently, NAB and Network Affiliates agree with the *Notice*'s conclusion that the affected stations not be included on the

---

[50] H.R. REP. 108-634, at 13-14.

[51] 47 U.S.C. § 341(b).

[52] *See Notice* at ¶ 54.

Significantly Viewed List at this time.[53]

XI. Enforcement and Notice Provisions

The Commission's tentative conclusions with respect to the enforcement and notice provisions in Section 340(f) and (g) follow directly from the statutory language, and NAB and Network Affiliates agree with the rule amendments as proposed.[54] Among these conclusions is that the Commission address allegations of bad faith on the part of satellite carriers or frivolousness on the part of broadcast stations on a case-by-case basis. However, the Commission further inquires as to identifying particular circumstances that would generally warrant such a finding of bad faith or frivolousness.[55] Attempting to identify such circumstances in the abstract could have the effect of turning such circumstances into a *per se* finding, which is the antithesis of making the determination on a case-by-case basis. Accordingly, the Commission should not attempt to identify or specify circumstances that would generally warrant a finding of bad faith or frivolousness in its order in this proceeding but should, instead, await to determine in a particular case whether any particular factual circumstance that is presented to it for adjudication amounts to bad faith or frivolousness.

Conclusion

For the reasons set forth above, NAB and Network Affiliates respectfully request that the Commission implement SHVERA's significantly viewed provisions as explained herein.

---

[53] *See Notice* at ¶ 53.

[54] *See Notice* at ¶¶ 55-61.

[55] *See Notice* at ¶ 56.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
AND THE
ABC, CBS, FBC, AND NBC
TELEVISION AFFILIATE ASSOCIATIONS

/s/
Marsha MacBride
Benjamin F.P. Ivins
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

/s/
Wade H. Hargrove
Mark J. Prak
David Kushner
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street Mall
Raleigh, North Carolina 27601
Counsel for the ABC Television Affiliates Association and for the FBC Television Affiliates Association

/s/
Jonathan D. Blake
Kurt A. Wimmer
Jennifer A. Johnson
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Counsel for the CBS Television Network Affiliates Association and for the NBC Television Affiliates Association

April 8, 2005

93471.10